AT INTERNATIONAL LTD
versus
ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT
KUDYA J
HARARE 21 January and 21 October 2015

Value Added Tax Appeal

AP de Bourbon, for the appellant
T Magwaliba, for the respondent

KUDYA J: The answer sought in this appeal is whether, the appellant, a foreign registered company is liable to pay value added tax in Zimbabwe. The appellant disputed liability for VAT arising from the purported importation of goods into and the carrying on of trade in Zimbabwe and appealed against a contrary determination of the respondent.

Introduction

The appellant is an International Business Company incorporated on 19 May 2005 in the British Virgin Islands in Guernsey in the Channel Islands but is not permitted to trade in that jurisdiction. The respondent is a body corporate responsible for the collection, amongst other imposts, of value added tax in Zimbabwe.

The facts

The original intention of the appellant in Zimbabwe, prior to 1992, was to invest in property and participate in the construction of the Chitungwiza road[1]. Instead, the appellant became a supplier of basic commodities to local companies that included the WG, hereinafter referred to as the holding company. It concluded an agency agreement with D & T, a subsidiary of the holding company in 1992. By 1999 it was supplying basic commodities

[1] The testimony of the sole witness called by the appellant and the minutes of 13 February 2009, p8 of commissioner's case

under a US$10 million line of credit registered with the Reserve Bank of Zimbabwe to the holding company and other local customers[2]. On 1 October 2007, the Governor of the Reserve Bank of Zimbabwe unveiled the Basic Commodities Supply Side Intervention, BACOSSI, facility designed to end the chronic shortages of basic commodities in Zimbabwe[3]. The facility commenced in May 2008 and continued until the introduction of the multicurrency regime on 29 January 2009. In May 2008 officials of the RBZ amongst whom was the Governor and the Senior Division Chief Strategic Planning and Special Projects, SDC, visited the warehouse of D & T in Chitungwiza. The RBZ was referred to the appellant by D & T. The appellant and the RBZ commenced negotiations which culminated in the purchase of the non Bacossi basic commodities that were in the D & T warehouse valued at US$ 7 987 207-54. The two parties also concluded an agreement in which the appellant supplied basic commodities to the RBZ in Zimbabwe, the bacossi goods, valued at US$ 11 698 174 between July and September 2008.

The baccossi agreement was reduced to writing[4] but was not signed by the parties apparently because the appellant was unhappy with the preamble to the agreement. A verbal agreement, purportedly concluded between the RBZ represented by the Governor and the appellant, represented by a named Ukrainian lady governed the supply relationship between them.

The respondent conducted a tax investigation of the purchases in foreign currency of the Reserve Bank of Zimbabwe from the appellant for the period between May 2006 and September 2008. The investigations revealed non-payment of VAT on the supplies made in that period[5]. They also revealed that D & T was paid commission, in terms of an agreement between them, on the invoiced supplies from 1 January 2006 to 31 January 2009. On 9 February 2009[6] the respondent made written demand on the finance director of the holding company who was also the public officer of D & T for the payment of VAT on the invoiced income paid to the appellant during that period. On 13 February a meeting was held at the RBZ between the Senior Division Chief Strategic Planning and Special Projects, the investigators of the respondent and the liaison officer of the appellant who was also the sales and marketing director of the holding company of D & T, the appellant's agent.

[2] Letter from appellant , p 112-113 of exhibit 1
[3] Monetary Policy Statement para 6.21 and 6.23
[4] The unsigned agreement is on pp 34-41 of the R 5 (c) documents.
[5] Minutes of 20 March 2009, p 91 exhibit1, attended by three investigators of respondent and two tax advisors of appellant, the VAT head, as stated in exhibit 2 and the minute taker.
[6] Pp20-21 of exhibit 1

On 12 March the respondent appointed the CEO of the holding company of D & T as the public officer for the appellant in terms of s 61 of the Taxes Act on the ground that his company was closely linked and connected to the appellant's local trading activities. The CEO objected to the appointment on 17 and 20 March 2009 on the ground that he was not an agent, employee, director or signatory to the bank account of the appellant but the respondent did not relent in its demand. On 20 March 2009 at the respondent's offices, a meeting was held between three representatives of the respondent and two tax advisors from a local firm of accountants. In reply to Mr *Magwaliba*, for the respondent's oral submissions, Mr *de Bourbon*, for the appellant, disputed that the appellant was represented at the meeting and suggested that the tax accountants represented D & T. The purpose of the meeting was to get the respondent's version on the VAT issues pertaining to both the appellant and D & T. The VAT head from the tax advisors provided respondent with two letters of his firm's mandate to represent the client. It is inconceivable that he would not have received full instructions from his client as he indicated were that client D & T. I am satisfied from the heading of the minutes minuted by the tax advisors that they represented the appellant and not D & T. In any event, the briefing given him by the respondent related to the alleged activities of the appellant including the payment of 0.1% commission on the gross sales of the appellant in Zimbabwe to D & T. On 30 March the public officer of D & T disputed the legality of the appointment of his CEO as a public officer for the appellant. He nonetheless compiled and delivered the monthly breakdowns of the income received by D & T during the period from January 2006 to 31 January 2009 requested in the letter of 9 February.

On 25 March 2015[7]the appellant wrote to the respondent objecting to the appointment of the public officer outside its registered place of business in Guernsey and to the tax liability claim. The basis of the objection was that it did not maintain offices nor employ staff nor was it a VAT registered operator obligated to charge VAT on goods purchased from its foreign based operations and supplied to clients in Zimbabwe. The relevant part of the letter reads:

> "We object to your claim that we have a tax liability in Zimbabwe as we do not have a self-established presence in the country. Our involvement with Zimbabwe clients and the West Group is limited to the supply of our stock to agents who operate on a commission basis to store and handle our stock that we hold in Zimbabwe, for which we have always operated with Reserve Bank Approval".

[7] p 31 of exhibit 1

The objection by the appellant of 25 March and the further objection of its compulsorily appointed public officer were dismissed by the respondent on 31 March 2009. On1 April the respondent proceeded to appoint the holding company and its subsidiaries as an agent for the collection of VAT due from the appellant purportedly in terms of s 48 of VATA[8]. On 3 April 2009 the appellant through its authorised signatories wrote to the CEO of the holding company appointed as its public officer and copied the letter to the head of investigations of the respondent and the Senior Division Chief Strategic Planning and Special Projects on the tax enquiry conducted by the respondent disputing tax liability on two grounds. The first was that it was not the importer and the second was that the sale to the importer, the RBZ, took place outside Zimbabwe.

I believe exh 2 may have been written by the compulsorily appointed public officer for the appellant between May 2009 and 17 June 2009 and not on 15 April 2008, as it is highly unlikely that the author possessed prescient powers to predict the events that were to take place between January and May 2009. It was addressed to the prospective external legal practitioner of the RBZ. The writer summarised the history of the relationship between the appellant and the holding company and one of its subsidiaries, D & T before and during the bacossi period. He also dealt with the relationship between these parties and the Reserve Bank of Zimbabwe and exonerated the appellant from VAT liability. In response, on 17 June 2009 the external legal practitioner of the RBZ wrote a six page legal opinion to the Senior Division Chief on the US$4 m tax dispute[9].The legal practitioner in question had apparently held a meeting on 21 April with the Senior Division Chief of the central bank and two representatives of the holding company. He believed that his mandate to protect the interests of the RBZ coincided with the interests of the appellant**.** He had engaged the lawyers of record of the appellant. He identified the common problem to be the demand for VAT on appellant in respect of the supply of Bacossi goods and its agent on commission received from appellant. Apparently the appellant declined to supply him with information on its business profile, shareholders and directors, summary of significant business activities in the 12 months to the date of the letter and on the nature and extent of its business activities in Zimbabwe, its certificate of registration, any board resolutions on Bacossi transactions and its local call account. In the absence of this information, he could not state with certainty that the appellant was not conducting local trading activities nor exclude it from VAT liability other

[8] p20-29 of exhibit 1
[9] p 105-110 of exhibit 1

than on the mere say so of its agent, D & T. He advised that the RBZ was liable for the payment of VAT in local currency on the basis of the bills of entry that identified it as the importer. He urged the RBZ, for strategic reasons that he set out in the opinion to tender the duty in local currency hoping that if the respondent accepted the payment the appellant would automatically be exempted from liability.

On 1 July 2009 the Senior Division Chief wrote to appellant's legal practitioner of record. She confirmed the importation of Bacossi goods and the acceptance of liability for VAT by the RBZ[10]. On 20 August 2009 three members of respondent investigations team held a meeting with four RBZ employees at the RBZ amongst whom was the SDC. In that meeting the RBZ repudiated the concession made by the SDC and laid liability at the doorstep of the appellant. However, in view of the national importance of the project and the profile of the major beneficiaries, the RBZ resolved to seek exemption for payment of VAT on these goods from the Ministry of Finance by 25 August 2009. A further meeting was held on 7 October 2009 in the governor's boardroom at the central bank between the Reserve Bank and the holding company to discuss the appellant/RBZ VAT liability of US$3.2m[11]. In attendance were the governor, his advisor, bank secretary and a strategic planning executive for the RBZ and the sales and marketing director, indicated in exh 2 as the liaison officer of the appellant, and another officer of the holding company. Notwithstanding that the respondent was not claiming VAT from the central bank, the Governor prevaricated on whether the RBZ accepted liability or not. In one vein he accused the SDC of erroneously accepting liability for the central bank without his express authority and in the other he was prepared to pay the VAT as long as it was charged in Zimbabwe dollars. The sales and marketing director for the holding company declined to answer for the appellant insisting that D & T acted as liaison for appellant as the foreign supplier and local buyers. The underlying suggestion from her contribution was that the appellant was not liable for VAT. In addition the concluding remarks of the meeting suggested the existence of minutes of meetings between the RBZ and the appellant.

The investigation prompted the respondent to raise against the appellant schedules for outstanding VAT on both the non Bacossi and Bacossi transactions initially on 17 March and later on 15 July 2009 in the sum of US$ 6 302 712-13 inclusive of interest and penalties which it corrected by the exclusion of zero rated products on 13 October 2009 by reducing

[10] p 95-104 exhibit 1
[11] p 94-104 of exhibit 1

the amount to the sum of US$6 249 496-70. The computations of the principal VAT due in each month for the non Bacossi commodities were in the sum of US$ 1 198 081-13. The respondent added an equal amount in penalties and a further amount of US$ 206 799-52 in interest and requested payment of US$ 2 602 961.79 for the non Bacossi commodities. In regards to the Bacossi commodities it claimed a principal sum of US$ 1 754 726-10 and a penalty in an equal amount and interest from 21 July 2008 to 23 October 2009 in the sum of US$ 137 082-72 totalling US$ 3 646 534-92.[12]

The appellant lodged an objection to the assessment in terms of s 32 of the Value Added Tax Act [*Chapter 23:12]* through its legal practitioners of record on 25 September 2009. It also applied for condonation from the Commissioner for filing the objection outside the normal time limits. It set out four grounds for condonation and eight grounds of objection. The respondent dismissed the condonation and disallowed the objection. The appellant appealed both decisions to this Court on 12 October 2009. The respondent filed its reply on 12 November 2009.

In the objection the appellant denied ever doing business in Zimbabwe and indicated that the local transactions were imports carried out by the holding company, the RBZ and other local companies. It averred that the appellant was authorised by the RBZ to sell the goods in foreign currency using free funds from non-resident entities. It supplied goods in bond to its local agent D & T for commission. The local buyer took delivery of the goods after paying the appellant from free funds. On receipt of payment the appellant instructed D & T to pay duty and VAT before releasing the goods. The appellant averred that the VAT claim on non Bacossi goods constituted a double claim for VAT already paid by D & T.

The appellant called the evidence of the founder and chairman of the holding company and director of D & T. He confirmed the foreign status of the appellant and its relationship with D & T before the Reserve Bank of Zimbabwe came onto the scene. The holding company, D &T and the appellant were not related companies. The contact between the appellant and D & T was facilitated by his Russian partners in 1992. The relationship between the appellant and D & T was one of principal and agent. The central bank appeared on the scene in May 2008. At that time, the agent, D & T, imported the goods into Zimbabwe that were supplied by its principal, the appellant. The central bank concluded two agreements with the appellant. The first related to the purchase of the goods stored in the warehouse that

[12]Annexure C: p 10-18 of respondent's case

had been imported by D & T, referred to in the appeal as the non Bacossi goods. The second agreement concerned the Bacossi good sunder which the central bank directly imported in excess of 400 truckloads of goods from South Africa between July and September2008.At Beitbridge, the goods were checked against the bill of entry before they were taken to the bonded warehouse and unlike direct home consumption imports, the bill of entry was not surrendered at that stage. D &T stored the Bacossi goods for the Reserve Bank for a fee. The relationship between the appellant and D & T was suspended during the duration of the Bacossi imports. The goods were received and secured by the RBZ. The RBZ would take the goods from the warehouse once D & T received a release order from the appellant confirming receipt of the purchase price and after D & T had paid duty and VAT for the goods. The clearing agent invoiced D & T for clearance fees. D & T in turn added these to the storage fees for the account of the Reserve Bank of Zimbabwe. He identified the South African export documents and the Zimbabwean import documents encompassing pp33-90 of exh 1. Amongst these documents were local bills of entry that identified the importer as the Reserve Bank of Zimbabwe. The witness confirmed his managing director's assertion in the letter of 30 March to the respondent that D & T was not paid commission by the appellant during the subsistence of the Bacossi imports. It was on the basis of this evidence that Mr *de Bourbon* submitted that the sole witness was credible and reliable in all material respects.

I do not agree with the contention by Mr *de Bourbon* that the witness was a credible and reliable witness who gave his evidence well. Under cross examination, he contradicted material parts of his evidence-in-chief. He abandoned his earlier version that the relationship of principal and agent between the appellant and D & T was suspended during the Bacossi imports. He categorically stated in cross examination that the relationship did not change for both the Bacossi and non Bacossi imports as the appellant continued to pay D & T in foreign currency commission at the rate of 1 % of the value of each transaction. The appellant maintained its grip on the goods in the warehouse and directed its agent to pay duty and VAT and thereafter release the goods after confirming receipt of the transaction value of each consignment from the Reserve Bank of Zimbabwe. He incorrectly stated that VAT was paid for the non Bacossi goods. That VAT was never paid was demonstrated by the abandonment of the double claim ground at the hearing of this appeal. He did not participate in the discussions that culminated in the agreement between the appellant and the central bank. He was not privy to the terms and conditions of the agreement. He did not interact with any of the directors and authorised signatories of the appellant. He had met an officer of the

appellant whose name appears in the last paragraph on p 112 of exh 1 once in Harare. He was not a director, employee or official of the appellant or the clearing agent. His version on the motivation of the clearing agent to invoice D & T rather than the RBZ was not confirmed by evidence from the clearing agent or the central bank. He did not produce any evidence to show that D & T included the charges of the clearing agent in the storage fees levied on the central bank.

The evidence of the sole witness left gaps that could only be filled by the directors, employees, officials or agents of the appellant. His averments preceding the incorporation of the appellant on 19 May 2005 underscored his unreliability and the need for the testimony of the active officers or agents of the appellant. It is simply incomprehensible how he could have dealt with the appellant before it was incorporated. The respondent's investigation established that the RBZ purchased non Bacossi goods between May 2006 and June 2008 contrary to his testimony that the purchase started in May 2008. I am satisfied that he was not a credible and reliable witness.

Rule 5 (c) documents

The respondent did not file r 5(c) documents within 14 days of entering his reply as required by r 5. The material correspondence contemplated by r 5 (c) would consist of the notice claiming the outstanding VAT, the letter of objection and the commissioner's response to the objection. Rather, at the hearing and soon after the appellant had closed its case Mr *Magwaliba*, for the appellant, produced the purported documents from the bar. The documents consisted of a letter of objection dated 21 October 2014, a set of original VAT assessments issued by the respondent against the appellant on that date for the period May 2006 to August 2008, the letter of objection of 25 September 2009 and the unsigned agreement on the supply of basic commodities between the appellant and the Reserve Bank of Zimbabwe. It did not file the ruling dismissing the condonation sought and disallowing the objection. In the letter of objection the appellant refers to "assessments the last of which are dated 15 July 2009". The earlier assessments of 17 March and 22 May and the letters of 24 June and 10 September 2009 referred to in the notice of appeal were not produced in evidence nor did they form part of the r 5 (c) documents or the pleadings. The respondent must simply comply with the law to obviate unnecessary delays associated with his failure to abide by the law in this regard. The documents constitute a type of record of proceedings, which helps this Court understand the real dispute between the parties and the basis on which

the determination appealed against was made. That the objection was dismissed on the ground that it was filed out of time was only disclosed in the respondent's reply to the notice and grounds of appeal. Rule 5(c) documents are simple documents that the respondent always has in its possession even before filing his reply. This kind of dilatoriness on its part is totally inexcusable. The respondent is directed to comply with r 5 (c) in all future cases.

Condonation

At the pre-trial hearing of 17 September 2014, by consent of the parties, the delay in the filing of the notice of objection by the appellant and the failure to file r 5 (c) documents timeously by the respondent were condoned.

The issues

The four issues referred for appeal were:

a. Was the appellant the importer of the goods in question into Zimbabwe?
b. Does the appellant operate a business in Zimbabwe?
c. In terms of s 6 of the VAT Act [*Chapter 23:12]* who was responsible for the payment of VAT on the imported BACOSSI goods and separately on the imported non-BACOSSI goods?
d. Was the appellant liable to pay any outstanding VAT in foreign currency?

I proceed to resolve each issue in turn.

Was the appellant the importer of the goods in question into Zimbabwe?

It was common cause that the onus was on the appellant to establish the identity of the importer of the basic commodities in question. Mr *de Bourbon* submitted that the evidence of the sole witness called by the appellant and the documentation produced established on a balance of probabilities that the Reserve Bank of Zimbabwe rather than the appellant was the importer. Mr *Magwaliba* submitted that the evidence and documentation showed the appellant as the importer.

The import documentation in exhibit 1

The exportation of goods from South Africa is facilitated by the production of the Republic of South Africa Exchange Control Declaration F178[13] also known as the foreign currency payment declaration and the South African bill of entry. The F178 foreign currency payment declarations in exh 1 were marked SL 15 to SL 20 for easy of reference[14].These were issued to the appellant for the basic commodities destined for Zimbabwe. Attached to the foreign currency declarations are commercial invoices of the South African vendor indicating both the purchaser and vendor and the purchase price.[15] The South African vendor is indicated as the exporter/consignor. The appellant is shown as the consignee. Attached to some of the foreign currency declaration forms are customs road consignment notes/delivery notes CIF Harare and export clearing and forwarding instructions raised by the transporter. The vendor is described as the shipper while the appellant is described as the consignee[16]. The customs road manifest placed the responsibility for customs clearance and delivery of the goods under official supervision at the destination on the appellant as consignee. The appellant paid the South African clearing agent.[17] The customs road freight manifest on pp 69 and 70 identified the two different clearing agents in South Africa and Zimbabwe. The consignee in Zimbabwe on one of the road manifests was D & T.

The Zimbabwe Customs and Excise require the South African exchange control declaration and the commercial invoice of the South African vendor and their attachments for the goods to enter Zimbabwe. Zimbabwe Revenue Authority Bills of Entry Form 21 together with commercial invoices issued in the name of the appellant were presented, accepted and processed by Zimbabwe Customs at Beitbridge.

The commercial invoices from the appellant were generated by the appellant under its letter head[18]. The importer is shown as the RBZ, delivery CIF Harare to the agent of the appellant on condition the goods are not released unless pre-paid to the offshore account in the appellant's name with the Royal Bank of Scotland.

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[13] Similar to the local CD1 form
[14] found on pp 73, 63, 49 and 39, respectively of exhibit 1
[15] pp 50 to 53, 60 and 72 of exhibit 1
[16] SL 17 pp 46-48 of exhibit 1
[17] SL20 pp40 and 41
[18] pp 36 &38 dated 6 August 2008, p 44 dated 4 August, and p 62 dated 28 July 2008 of exhibit 1

The local bills of entry Form 21 are marked SL and WP in exh 1[19]. All the SL bills of entry were generated by the clearing agent MCFZ between 25 July and 8 August 2008 while all the WP bills of entry were generated by a different clearing agent BCS between 20 and 28 June 2008. These bills identify the appellant as the exporter/consignor and the Reserve Bank of Zimbabwe as the importer/consignee. No duty was charged for all the SL consignments while duty was demanded from the declarant/clearing agent for 2 of the WP consignments. The ones for which no duty was levied were released on the strength of the customs release orders attached to each bill of entry. There are invoices issued by MCFZ to D & T account RBZ for import handling fees[20]. The invoices of 31 July and 26 August 2008 show that the clearing fees submitted to D & T were inclusive of VAT.

It was on the basis of the bills of entry that Mr *de Bourbon* submitted that the appellant was not liable for VAT as it was not the importer. In his supplementary written heads of argument filed with the leave of the Court on 27 January 2015, he relied on s 12 of the Civil and Evidence Act and *R* v *Karge & Anor* 1971 (3) SA 470(T) at 473F.S 12 reads:

> "**12 Public and official documents**
>
> In this section—
>
> "public document" means a document—
>
> (*a*) which was made by a public officer pursuant to duty to ascertain the truth of the matters stated in the document and to make an accurate record thereof for public use; and
>
> (*b*) to which the public have a right of access;
>
> "public officer" means a person holding or acting in a paid office in the service of the State or a local authority.
>
> (2) A copy of or extract from a public document which is proved to be a true copy or extract or which purports to be signed and certified as a true copy or extract by the official who has custody of the original, shall be admissible in evidence on its production by any person and shall be *prima facie* proof of the facts stated therein.

In *R* v *Karge* (*supra*), at 473F Hiemstra J stated that:

> "A public document is one made by a public officer in the execution of a public duty; it must be intended for public use and the public must have a right of access to it (*Northern Mounted Rifles v O'Callaghan* 1909 TS 174 at pp 176-177). The mere production will furnish *prima facie* proof of the contents provided that it is the public duty of the person who keeps the register or the records to make entries satisfying himself of the correctness thereof."

[19] p 35 for SL20, p 56 to 58 for SL17, p 65to 67 for SL 15, p75 for SL 14 and p 77 for WP1, p 80 for WP2, p 82 for WP3, p 84 for WP5 p 86 for WP6 p 88 for WP 8 and p 90 for WP 9.

[20] pp 33, 61 and 68 of exhibit 1

Mr *de Bourbon* submitted that these bills of entry were public documents that were proffered and accepted in terms of the Customs and Excise Act established that the RBZ and not the appellant was the importer. In his response of 4 February 20105 Mr *Magwaliba* conceded that the bills of entry were public documents provided by the respondent for the entry of goods into Zimbabwe. He, however, forcefully argued that the other evidence led by the appellant together with the unsigned agreement of the supply of basic commodities between the appellant and the RBZ eclipsed all reference in the bills of entry of the RBZ as the importer. It is indisputable that Customs officials employed by the respondent are public officers who hold paid office in the service of the State. The bills of entry are public documents whose contents are *prima facie* correct. I accept that the evidentiary onus to disprove the correctness of the contents of the bills of entry shifted to the respondent.

The respondent used the unsigned agreement as an antidote for the bills of entry. The preamble indicates that the appellant was represented by the liaison officer who it will be recalled was also the sales and marketing director of the holding company while the RBZ was represented by its Senior Division Chief Strategic Planning and Special Projects. The preamble further suggested local incorporation and a local business address for the appellant. The main body of the agreement identified the products, their quantities and transactional values. The main features were that the appellant was responsible for delivering the goods CIF Harare or any other destination in Zimbabwe and was to be paid cash on delivery weekly for 3 months. It was also responsible for weighing, inspection and packaging at loading sites outside Zimbabwe where the RBZ could conduct random inspections at the appellant's expense. The RBZ undertook to facilitate expeditious clearance of the goods at the Zimbabwe ports of entry.

While the respondent had the duty to disprove that the importer was the RBZ, the true, overall and unchanging onus to prove the correct terms and conditions in the agreement reached between the appellant and the RBZ lay on the appellant. In other words, the onus to establish that the terms and conditions in their agreement were different from those captured in the unsigned agreement was on the appellant. The appellant did not lead any evidence on this aspect. The evidence placed before the court by the appellant was that the agreement was not signed because of what counsel termed "erroneous information in the preamble". The erroneous information related to its place of incorporation and business address. I agree with Mr *Magwaliba* that the unsigned agreement placed the duty to import the goods into Zimbabwe on the appellant. Again, the delivery of the goods cost insurance and freight

Harare strongly suggests that the appellant imported the goods into Zimbabwe. It would not make sense for the RBZ to undertake to expeditiously facilitate the quick clearance of its imports. The obligatory cost, insurance and freight Chitungwiza bonded warehouse delivery clause and the expeditious clearance clause suggests that the appellant was the importer.

The strategic planner for the RBZ stated in the minutes of 13 February 2009 that the appellant was responsible for the importation of basic commodities under the bacossi project and that the goods in the Chitungwiza bonded warehouse belonged to the appellant from where they were received, secured and dispatched by the RBZ. She also stated that D & T was a representative of the appellant that looked after all the interests of the appellant in Zimbabwe. She was supported by other officials of the RBZ such as the special advisor to the governor in the minutes of 20 August 2009 and the governor on 20 October 2009. She even intimated the existence of cross shareholding between the appellant and D & T preceding the bacossi project. She, however, subsequently confirmed that the RBZ imported the Bacossi goods from the appellant and accepted liability for VAT in her letter of 1 July 2009. The concession reinforced the assertions of the public officer for D & T in his letter to the respondent of 30 March 2009, the testimony of the sole witness, the letter of the appellant of 3 April 2009 to the purported public officer and copied to both the RBZ and the respondent, the purported public officer's letter to the prospective external legal advisor of the RBZ erroneously dated 15 April 2008 and that legal advisor's letter to the RBZ of 17 June 2009.The onus to call evidence to establish what the correct factual position of the RBZ was lay on the appellant. This much was admitted by Mr *de Bourbon* in his heads of argument by reference to *Commissioner of Taxes* v *'A' Company 1979* (1) RLR 29 (A) at 42; 1979 (2) SA 409 (RAD) at 416; 41 SATC 59 (RAD) at 68. The appellant did not produce the bill of entry from South Africa which would have shown who the exporter of the goods from South Africa was. The sole witness stated that the importer of the non-bacossi goods was D & T.

The definition of "export" and "exporter" in s 2 of the Customs and Excise Act [*Chapter 23:02]* and "exported" and "export country" in s 2 of the Value Added Tax Act denote the removal of goods from Zimbabwe. Exporter is defined in the Customs and Excise Act as "any person in Zimbabwe who takes goods or causes goods to be taken out of Zimbabwe and includes any employee or agent of such person and the owner of such goods as are exported." On the other hand to import is "to bring goods or cause goods to be brought into Zimbabwe" and an "importer in relation to goods includes any owner of or other person possessed of or beneficially interested in any goods at any time before entry of the same has

been made and the requirements of this Act fulfilled." In my view, the business activities of the appellant fell outside the definition of "exporter" but squarely fit the definition of "importer".

It was a misnomer to refer the appellant in the bill of entry as an exporter. An importer is identified with ownership or possession of the goods or beneficial interest in the goods before entry and the fulfilment of the requirements of the Customs Act. Entry is defined in s 2 of the Customs Act "in relation to clearance of goods for importation means the presentation in accordance with this Act of a correctly completed and signed declaration on a bill of entry in writing". The documents generated in South Africa show that the RBZ was not the owner nor possessor nor beneficiary of the goods before the correctly filled and signed bills of entry were presented to Customs officials of the respondent. Rather, these South African derived documents show beyond even a shadow of doubt that the goods were for the benefit of the appellant who owned and possessed them before any of the bills of entry were presented to Customs officials.

Even though the sole witness stated that D & T was the importer of the non-bacossi goods, it was clear that it was operating as an appendage of the appellant. There was preponderance of evidence establishing that D & T acted at all times as an agent importer in behalf of the appellant. I am satisfied that notwithstanding the contents of the bills of entry and other documents complied by or at the instance of the appellant to the contrary, the appellant was the owner or possessor of the goods who also had a beneficiary interest in them before they entered Zimbabwe who brought them or caused them to be brought into Zimbabwe. I hold that the appellant was the importer of both the non-Bacossi and the Bacossi goods.

Does appellant operate as a business in Zimbabwe?

Counsel were agreed that this was a factual issue. The onus was on the appellant to establish on a balance of probabilities that it did not operate a business in Zimbabwe. It was common cause that the appellant was a foreign company registered in Guernsey in the Channel Islands. It was further common cause that as an International business corporation it was by the law of its domicile not permitted to operate in the Channel Islands and all the territories that comprise the British Virgin Islands.[21]Mr *de Bourbon* contended that the

[21] Para 6 of the appellant's memorandum of association p 4 of exhibit 1.

appellant did not conduct any business within Zimbabwe but was merely an exporter and not an importer. Mr *Magwaliba* contended that the appellant carried on business in Zimbabwe.

The evidence led on behalf of the appellant from the sole witness showed that it purchased goods from South Africa for the local market during the period under consideration. It did not produce the bills of entry issued by the South African Revenue Service Customs and Excise for the exportation of goods to Zimbabwe. The South African documentation produced showed that it was the consignee. It was common cause that a consignee is a recipient. In none of the South African documents that were produced was the appellant described as the exporter or even as the consignor of the goods. Perhaps the South African bill of entry may have revealed how the appellant was regarded by South African Customs Service.

The sole witness and some of the documentation testified to the long history of the appellant's interaction with business activities in Zimbabwe. He was helped connect D & T to appellant by Russian partners who had a 15 year old US$30 million line of credit with the Reserve Bank of Zimbabwe. The appellant averred in the letter of 3 April 2009 that it had been extending financial support over the "past 10 years despite the difficult environment in Zimbabwe" and was "continuing to support and supply goods to Zimbabwe under our USD 10 million line of credit extended to the holding company and other customers in Zimbabwe." The same letter stated that sales to the RBZ "took place outside of Zimbabwe". As the appellant was only incorporated on 19 May 2005, it seems to me that the 10 to 15 year periods mentioned by the appellant in the letter of 3 April 2009 and by the sole witness in his evidence were incomprehensible falsehoods. The waybills indicated that the appellant delivered the Bacossi goods cost insurance and freight to the bonded warehouse of D & T from where the RBZ took delivery and secured the goods with police help. On 25 March 2009 the appellant strongly objected in writing to the head of investigations of the respondent to the compulsory appointment of the public officer outside its registered place of business in Guernsey and denied being self-established in Zimbabwe. The appellant intimated that:

> "Our involvement with Zimbabwean clients and the holding company is limited to the supply of our stock to agents who operate on a commission basis to store and handle our stock that we hold in Zimbabwe, for which we have always operated with Reserve Bank approval."

The appellant admits to storing, holding and handling stock in Zimbabwe through agents who operated on commission. The existence of an agency agreement between the appellant and D & T was confirmed by the sole witness in his testimony and maintained by

the compulsorily appointed public officer of the appellant in Exhibit 2, his letter to the prospective external counsel for the central bank. The author indicated that the appellant had "in the past provided trade services to various Zimbabwean companies" and his holding company had utilized the "appellant's services over the last years". The commissions received were paid into the requisite foreign currency account. The subsistence of the agency before the institution of the Bacossi project was confirmed by the sole witness in his testimony.

Mr *Magwaliba* contended that the activities of the respondent constituted trade under the definition of trade in s 2 of VATA. It reads:

> "trade" means—
> (*a*) in the case of any registered operator, other than a local authority, any trade or activity which is carried on continuously or regularly by any person in Zimbabwe or partly in Zimbabwe and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any trade or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing or professional concern or any other concern of a continuing nature or in the form of an association or club
>
> Provided that—
> V. any activity, shall to the extent to which it involves the making of exempt supplies, be deemed not to be the carrying on of a trade;"

The definition of trade is all encompassing. The phrase "or any other concern of a continuing nature" expands the meaning beyond the seven examples of the activities that constitute trade. The activities of the appellant in Zimbabwe were conducted from 2005. Upwards of 400 truckloads of goods were dispatched to Zimbabwe in the four months covering the Bacossi period. These activities were carried on continuously and regularly unlike in *Young* v *Van Rensburg* 1991 (2) 149 (S) at 154F where Korsah JA held that the single purchase of a farm in Zimbabwe did not constitute "carrying on…. a gainful occupation or activity" under ss 8 (1) (b) (i) and (ii) of the Exchange Control Regulations RGN 399 of 1977.In *Mayhew* v *Alcock NO* 1991 (2) ZLR 203 (S) at 205A McNally JA held that "carried on" was synonymous with "transacted. In the present case, both the non Bacossi and the Bacossi goods were supplied to the RBZ over a long period of time commencing from May 2006 and ending in September 2008. The appellant was accordingly trading in Zimbabwe.

Mr *de Bourbon* took the point that as the appellant was not a registered operator, it could not be liable for VAT. It is correct that the appellant was not a registered operator.

However, every trader in this country is liable to be registered for VAT from the date of such liability under s 23 (3) and (4) of the Act. Subsection (4) (b) reads:

> "(4) Where any person has-
> (*b*) not applied for registration in terms of subsection (2) and the Commissioner is satisfied that that person is liable to be registered in terms of this Act, that person shall be a registered operator for the purposes of this Act with effect from the date on which that person first became liable to be registered in terms of this Act:"

The appellant under the provisions of s 23 (4) (b) is deemed to have been a registered operator. Again, s 56 (1) and (3) deem the principal to be the supplier of goods supplied or imported on its behalf by its agent. S 56 (1) and (3) provide that:

> (1) For the purposes of this Act, where an agent makes a supply of goods or services for and on behalf of any other person who is the principal of that agent, that supply shall be deemed to be made by that principal and not by that agent:
> Provided that, where that supply is a taxable supply and that agent is a registered operator, the agent may, notwithstanding anything to the contrary in this Act, issue a tax invoice or a credit note or a debit note in relation to such supply as if the agent had made a taxable supply, and to the extent that that tax invoice or credit note or debit note relates to that supply, the principal shall not also issue a tax invoice or a credit note or a debit note, as the case may be.
> ----
>
> (3) For the purposes of this Act, where any goods are imported into Zimbabwe by an agent who is acting on behalf of another person who is the principal for the purposes of that importation, that importation shall be deemed to be made by that principal and not by such agent:
>
> Provided that a bill of entry or other document prescribed in terms of the Customs Act in relation to that importation may nevertheless be held by such agent."

I am satisfied that the appellant was carrying on the business of supplying goods in Zimbabwe through the agency of D & T during the non Bacossi and Bacossi periods but certainly not in the 10 to 15 years enumerated in evidence by the appellant and its sole witness. The agent received commission and not the purchase price. It released the goods on the instructions of the appellant, apparently after the appellant had received payment as stipulated in the waybill and the commercial invoices issued by the appellant.

In terms of s 6 of the VAT Act [Chapter 23:12] who was responsible for the payment of VAT on the imported BACCOSSI goods and separately on the imported non-BACCOSSI goods?

Both counsel were agreed that the obligation to pay duty and VAT rested with the importer. Mr *de Bourbon* contended that the Reserve Bank of Zimbabwe was the importer and submitted that it had the obligation to pay VAT. Mr *Magwaliba* on the other hand identified the appellant as the importer who had the duty to pay VAT.

Section 6 (1) and (2) of the VAT Act state:

"**6 Value added tax**
(1) Subject to this Act, there shall be charged, levied and collected, for the benefit of the Consolidated Revenue Fund a tax at such rate as may be fixed by the Charging Act on the value of—
(*a*) the supply by any registered operator of goods or services supplied by him on or after the 1st January, 2004, in the course or furtherance of any trade carried on by him and:
(*b*) the importation of any goods into Zimbabwe by any person on or after the 1st January, 2004; and
(*c*) the supply of any imported services by any person on or after the 1st January, 2004; and
(*d*) goods and services sold through an auctioneer (as defined in section 56(6)) by persons who are not registered operators.
(2) Except as otherwise provided in this Act, the tax payable in terms of
(*a*) paragraph (*a*) of subsection (1) shall be paid by the registered operator referred to in that paragraph; and
(*b*) paragraph (*b*) of subsection (1) shall be paid by the person referred to in that paragraph; and
(*c*) paragraph (*c*) of subsection (1) shall be paid by the recipient of the imported services; and"

I have already found that the appellant was the importer. It was liable for payment of VAT in the pre-Bacossi and during the Bacossi era. Whether VAT was due on entry or on release of the goods from the bonded warehouse for home consumption does not exonerate the appellant from payment of VAT. Again on the basis of my findings in regards to registration, I am also satisfied that it was liable even under s 6 (1) (a). It supplied goods after 1 January 2004 in the course or furtherance of its business activities. I am satisfied that the appellant was liable to pay VAT.

Was the appellant liable to pay any outstanding VAT in foreign currency?

It was common cause that the appellant received payment for the goods that it supplied in foreign currency. Mr *de Bourbon* contended that the provisions of s 38 (4) promulgated by s 16 of the Finance Act 2006 (No 6 of 2006) rather than the present s 38 (4) substituted by s 29 of the Finance Act (Act 3 of 2009) is applicable in determining the appropriate currency of payment for VAT. The 2006 s 38 (4) reads:

> (4) Notwithstanding section 41 of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] and he Exchange Control Act [*Chapter 22:05*] where a registered operator receives payment of any amount of tax in foreign currency in respect of the supply of goods or services, that operator shall pay that amount to the Commissioner in foreign currency.
>
> In this subsection "foreign currency means United States dollars, Euros or any other currency denominated under the Exchange Control (General) Order, 1996, published in Statutory Instrument 110 of 1996, or any other enactment that may be substituted for the same."

The 2009 amendment introduced a new para (b) and extended the definition of foreign currency to include the British pound, South African rand and Botswana pula. S 38 (4) presently reads:

> (4) Notwithstanding section 41 of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] and the Exchange Control Act [*Chapter 22:05*] where a registered operator—
>
> *(a)* receives payment of any amount of tax in foreign currency in respect of the supply of goods or services, that operator shall pay that amount to the Commissioner in foreign currency;
>
> *(b)* imports or is deemed in terms of section 12(1) to have imported goods into Zimbabwe, that operator shall pay any tax thereon to the Commissioner in foreign currency."
>
> In this subsection "foreign currency" means the euro, British pound, United States dollar, South African Rand, Botswana Pula or any other currency denominated under the Exchange Control (General) Order, 1996, published in Statutory Instrument 110 of 1996, or any other enactment that may be substituted for the same.

Mr *de Bourbon* submitted that the appellant was not obliged to pay VAT in foreign currency as it was not a registered operator and did not receive payment of any tax. I have already determined that the appellant was required to be registered under s 23 (1) and (3) and (4) (b) as read with s 56 (1) and (3) of VATA and can be treated as would a registered operator. In my view, in terms of s 69 (1) of the Act, the failure to charge or receive VAT does not exonerate the appellant from liability as VAT is deemed to be included in the purchase price. S 69 (1) reads:

> **"69 Prices deemed to include tax**
> (1) Any price charged by any registered operator in respect of any taxable supply of goods or services shall for the purposes of this Act be deemed to include any tax payable in terms of paragraph (*a*) of subsection (1) of section *six* in respect of such supply, whether or not the registered operator has included tax in such price."

I have already found that s 6 (1) (a) applies with equal force to the appellant. VAT is deemed to be included in the purchase price. The appellant bears the obligation to remit VAT in foreign currency to the respondent. Thus even if s 38 (4) (b) is held to have come into force on 30 January 2009 after the non-bacossi and bacossi importations, the appellant remained liable for payment of VAT in foreign currency under the 2006 amendment.

Was the appointment the CEO of the holding company as the public officer for the appellant proper?

Mr *de Bourbon* contended both in his written heads and oral submissions that the appointment of the CEO of the holding company as the public officer of the appellant and the holding company and all its subsidiaries as agents for the collection of VAT was unlawful and contrary to the provisions of both s 61 of the Taxes Act and s 48 of the Value Added Tax Act. Mr *Magwaliba* agreed and indicated that the appointment was later revoked. The contention can only be correct if the appellant establishes on a balance of probabilities that it was not a related party to the holding company and any one of its subsidiaries. In my view, the architectural design of both the Taxes Act and the VAT Act allows the Commissioner to compulsorily appoint a public officer and an agent for the collection of VAT in the absence of a voluntary appointment by the taxpayer. Part VI of the Taxes Act provides for the payment of income tax by a representative taxpayer defined in s 53 (1) to include the public officer of a company or the agent who possessed, disposed of, controlled or managed or owed income for the principal. D & T did not hold any income for the appellant. The only section through which the appointment could be done was s 61 under which every company which carries on a trade or has an office or other established place of business in Zimbabwe is obliged to appoint a local resident its public officer. Where voluntary appointment is absent, s 61 (4) empowers the commissioner to designate one from amongst the managing director, director, secretary or other officer of the company as the public officer. In my view, s 61 must be read in conjunction with the definition of agent in s 2 of the Taxes Act which includes any company when acting as agent. It seems to me that this wider definition is contemplated in subs (8) for penalties and (9) for service of any notice, process or proceeding under this Act.

Section 47 (a) incorporates the public officer appointed under s 53 of the Taxes Act to perform the duties imposed by VATA on any taxpayer. The Commissioner is empowered by s 48 (2) to compulsorily appoint an agent from any holder of money due to or belonging to the taxpayer as the representative registered operator. Section 49 (2) makes the representative liable to pay tax, additional tax or penalties chargeable under VATA in respect of moneys controlled or transactions concluded or anything done by him in his representative capacity.
It appears to me that the appointment of the CEO of the holding company of D & T, the agent of the appellant, as a public officer and representative registered operator was above board because D & T acted as an agent of the appellant in Zimbabwe.

Use of an arbitrary exchange rate

In his written heads Mr *de Bourbon* contended that the respondent used an arbitrary exchange rate to convert Rand denominated transactions to United States dollar values. The respondent averred in para 13 of the Reply that the invoice values were supplied by the appellant's agents in both Rands and United States dollars together with the appropriate conversions. Mr *de Bourbon* submitted that the respondent had failed to establish how it converted the Rands into United States dollars. It seems to me that the respondent bore no such onus. Rather the onus was on the appellant to establish that the conversions were arbitrary. The appellant did not lead any evidence in this regard. In any event the submission runs contrary to the sentiments in *Fawcett Security Operations (Pvt) Ltd* v *Director of Customs & Excise & Ors* 1993 (2) ZLR 121 (S) at 127 F where McNally JA held that "the simple rule of law is that what is not denied in affidavits must be taken to be admitted." The averment in para 13 was not denied in the evidence led for and by the appellant. I am satisfied that the appellant failed to establish this ground of appeal. I took it that it abandoned this ground at the appeal hearing.

Costs

I am satisfied that the appellant's objection raised important legal points on the status of a bill of entry. The grounds of appeal were not frivolous.

Disposition

Accordingly, the appeal is dismissed with no order as to costs.

Gill, Godlonton & Gerrans, appellant's legal practitioners